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SOL (MSHA) v. MANALAPAN MINING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

MANALAPAN MINING COMPANY, INC.,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. KENT 91-104
A. C. No. 15-05423-03653

Mine No. 1

DECISION

Appearances: G. Elaine Smith, Esq., Office of the
Solicitor, U. S. Department of
Labor, Nashville, TN, for the
Petitioner;
Susan C. Lawson, Esq., Harlan, KY,
for the Respondent.

Before: Judge Fauver

The Secretary brought this case for civil penalties for two
alleged violations of safety standards, under the Federal Mine
Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

One of the citations (No. 99877861) was settled at the
hearing, and Respondent was ordered to pay a penalty of \$157. The
other citation went to hearing on the merits.

Having considered the hearing evidence and the record as a
whole, I find that a preponderance of the substantial, reliable,
and probative evidence establishes the following Findings of Fact
and further findings in the Discussion below:

FINDINGS OF FACT

1. At all relevant times, Respondent operated an underground
coal mine, known as Mine No. 1, which produced coal for sale or
use in or affecting interstate commerce.

2. On July 23, 1990, Federal Mine Inspector Larry Bush
issued 104(d)(1) Citation No. 3383894 to Respondent, for a

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violation of 30 C.F.R. 75.312, (Footnote 1) alleging that the ventilating air current for 004 working section was passing through a gob area (where pillars had been removed). Inspector Bush found that air from the gob area was passing into the intake air course through nine ventilation curtains hung along the intake air entry. He checked the movement of air in front of the curtains by using a smoke tube and by feeling the movement of the air. He did not check behind the curtains before issuing the citation.

3. Foreman Charles Polly was unsure how to abate the cited condition, because the nine curtains appeared to him to be snug and free of leaks. He took men to the bleeder system, and put up additional curtains there. He did not adjust, repair, or change the nine curtains observed by Inspector Bush.

4. The citation allowed 47 minutes to abate the cited condition. After that time passed, Inspector Bush issued 104(b) Order No. 3383897.

5. After Foreman Polly installed curtains in the bleeder system, he returned and Inspector Bush told him he issued the 104(b) order because air was still coming through the nine curtains. Foreman Polly asked the inspector to check the air with him before any miners were withdrawn under the 104(b) order. The inspector agreed to do so.

6. Inspector Bush and Foreman Polly then went to the front of one of the nine curtains near the gob area. They could feel air coming around the curtain and Inspector Bush confirmed the flow of air with a smoke test. They then went behind the curtain and the inspector conducted another smoke test, which showed that the air behind the curtain was moving slightly but it was moving back into the gob area, not through the curtain. They checked behind three other curtains in the same way, and the results were the same. As a result of these tests, Inspector Bush terminated the 104(b) order.

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7. The nine curtains along the intake course were a few feet outside the gob area.

8. On July 23, 1990, about 56,000 cfm of air was ventilating 004 section. This high rate of air movement created a swirling effect in the air in front of the nine curtains, giving the impression that air was passing from the gob area through the curtains. In fact, as the tests by Inspector Bush and Foreman Polly later showed, the air was not coming from the gob area.

9. Respondent's ventilation plan required concrete blocks or permanent type brattice at the place where the nine curtains were installed. On July 5, 1990, Respondent had applied to MSHA for approval of a supplemental plan that would permit the use of curtains. The application was denied by MSHA on July 23, 1990.

10. After termination of the citation and order, Respondent replaced the nine curtains with permanent type brattice.

11. On at least one prior occasion, curtains like the nine curtains inspected by Inspector Bush had been approved by MSHA at Mine No. 1 to prevent air movement from a pillared-out area into an intake air course.

DISCUSSION WITH FURTHER FINDINGS

On July 23, 1990, when Citation No. 3383894 was issued by Inspector Bush, the air in front of the nine curtains was swirling because of a high volume of air rapidly moving in the intake course. It gave the impression to Inspector Bush that it was coming from the gob (pillared-out area), but it was not.

At the location where the citation was issued, the ventilation plan required concrete blocks or permanent type brattice, instead of curtains, to keep air in the gob area from moving into the intake course. A pending application by Respondent to MSHA, to approve curtains, was denied on the date of this inspection, but that decision was not known by Inspector Bush or Foreman Polly at the time.

The evidence does not show that the air condition in front of the nine curtains was any different when Inspector Bush issued the citation compared to when he terminated it. The only factual difference is that, to check abatement of the citation, he went behind the curtains (for the first time) and made air tests. These showed that the air movement behind the curtains was going into the gob and not through the curtains into the intake air course. Respondent had not adjusted, repaired, or changed the nine curtains to abate the cited condition. The evidence thus raises a reasonable inference that the air condition behind the nine curtains was the same when the citation was issued and when it was terminated. The Inspector's finding of air moving from the gob

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through the curtains into the intake air course may be explained by the swirling effect in front of the curtains, caused by 56,000 cfm of air moving through the intake air course, and not air moving from the gob into the intake air course. On balance, the government has not shown by a preponderance of the evidence that the ventilation air in 004 working section was passing through the gob area.

CONCLUSIONS OF LAW

1. The judge has jurisdiction in this proceeding.
2. The Secretary failed to prove a violation of 30 C.F.R. 75.312 as alleged in Citation No. 3383894.

ORDER

WHEREFORE IT IS ORDERED that Citation No. 3383894 and Order No. 3383897 are VACATED and this proceeding is DISMISSED.

William Fauver
Administrative Law Judge

Footnote starts here:-

1. Section 75.312 provides:

Air that has passed through an abandoned area or an area which is inaccessible or unsafe for inspection shall not be used to ventilate any working place in any mine. No air which has been used to ventilate an area from which the pillars have been removed shall be used to ventilate any working place in a mine, except that such air, if it does not contain 0.25 volume per centum or more of methane, may be used to ventilate enough advancing working places immediately adjacent to the line of retreat to maintain an orderly sequence of pillar recovery on a set of entries.